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E.O. 12958: DECL: 1.6 FIVE YEARS AFTER CLOSURE ICTY

TAGS: [BK](#) [HR](#) [KAWC](#) [NL](#) [PHUM](#) [PREL](#) [SR](#) [ICTY](#)

SUBJECT: ICTY: PREVIEW OF CHIEF PROSECUTOR'S AND
PRESIDENT'S REPORTS TO SECURITY COUNCIL

(U) Classified by Clifton M. Johnson, Legal Counselor, for
reasons 1.5(D) and 1.6.

1. (C) Summary. Chief Prosecutor Carla Del Ponte and President Theodor Meron of the International Tribunal for the former Yugoslavia (ICTY) will present the Security Council with a difficult dilemma during their reports to the Council on October 9. Del Ponte will report that she intends to seek 14 additional indictments involving 30 perpetrators before the end of 2004. Meron will report that under his projections the Tribunal will not be able to conclude the trials of all existing indictments before the end of 2008 deadline set forth in the completion strategy. As a result, if Del Ponte carries through with her plans to indict an additional 30 perpetrators in the next year, the Tribunal's work will likely be extended for a minimum of two more years. Del Ponte and Meron's reports will put the Council on notice that the Tribunal is not on track to complete its work within the completion strategy targets; whether and how the Council reacts to this news will have help determine the likely lifespan of the Tribunal. End Summary.

Chief Prosecutor's Report

2. (C) Del Ponte's political adviser, Jean-Daniel Ruch, provided Embassy Legal Officers with a detailed preview of the report (largely drafted by Ruch) that Del Ponte intends to give to the Security Council on October 9. The speech is divided into three parts covering the Completion Strategy, Cooperation of States in the Region, and the Capacity of Domestic Courts to handle war crimes cases. With respect to the Completion Strategy, Del Ponte will confirm her intention of meeting the completion strategy's goal of completing all new investigations by the end of 2004. Between now and then she intends to issue about 14 new indictments involving 30 individuals, all at the "highest levels." Ruch explained that by this she means that the indictees will be at the general or ministerial level or their equivalents (i.e. with respect to the KLA). Del Ponte's goal is to seek ethnic/national proportionality with respect to the new indictments. Of the 14 projected new indictments, 5 could be joined with existing ones. As a result, Del Ponte's new investigations will necessitate an additional 9 trials for the Tribunal.

3. (C) With respect to investigations of lower level perpetrators, all work on those is, in essence, being halted. Del Ponte will report that she intends to refer 17 investigations involving 62 lower level suspects back to the region. Of these 12 (involving 48 suspects) will go to Bosnia and Herzegovina (BiH), 3 (involving 8 suspects) will go to Croatia, and 2 (involving 6 suspects) will go to Serbia and Montenegro (SAM). As underscored later in the speech, the ability and willingness of the Office of the Prosecutor (OTP) to actually transfer these cases back to the region will depend on the establishment of viable, just, and effective domestic judicial mechanisms to receive and handle the cases.

4. (C) Del Ponte will sum up this portion of her report by concluding that it will not be possible for the Tribunal to complete all trials in the first instance by the completion strategy's end of 2008 target date. She will indicate that consistent with her mandate, she will pursue the investigations described above until the end of 2004. She will propose that the Security Council decide in 2005, once the final results of her investigations are complete, which cases need to be tried in the Tribunal and which should be referred back to the region. Del Ponte will resist efforts by the Security Council to limit the scope of her investigations and will justify this position by referencing in her speech her legal mandate to continue investigations through 2004, the importance of prosecutorial independence, and the bad precedent (i.e. for the International Criminal Court) such interference would establish. (Comment: Del Ponte's strategy here is to defer any Security Council inquiry into her work until after her investigations are complete and the indictments issued. Once the indictments are issued, however, the international community will

essentially be faced with a fait accompli and have far less latitude than now to pursue changes in the ICTY's direction. End comment).

15. (C) The second part of Del Ponte's presentation will focus on Cooperation with States in the Region. With respect to Croatia, she will state that the authorities bear the responsibility for the failure to arrest and transfer Gotovina. She will characterize recent GOC reports describing their efforts and indicating that Gotovina is not in the country as a campaign to manipulate and influence public perception. She will directly reject the Croat assertions and say that sources "that we have in Croatia" have confirmed that Gotovina is in the country. She will conclude with the blunt assessment, in line with what she promised the UK, that Croatia has not fulfilled its obligations to cooperate as required under the relevant Security Council Resolutions. While Del Ponte's presentation with respect to Gotovina will be unambiguously critical, she will also acknowledge in passing that the GOC has done well in terms of making witnesses and documents available to the Tribunal.

16. (C) Del Ponte's presentation on Belgrade will also be very critical. She will report that Belgrade authorities have not done well in terms of fugitive apprehension. She will also say that they have not provided adequate access to documents. She will note that SAM only began delivering documents in the Milosevic case in recent months and that it was as a result of a court order rather than a genuine desire to cooperate. She will also offer another case study involving an OTP request for archive access that, after being outstanding for seven months, was only granted in the past week. In granting the request SAM authorities authorized access to documents from the 1996 to 2000 period, but declined to provide access to the 1991 to 1995 period that is of most interest to the OTP. Del Ponte's speech will characterize this as unacceptable and express her belief that SAM authorities are retaining information relating to Serb culpability in the Milosevic trial. She will also note that the OTP has 36 outstanding requests for state secrecy waivers to permit Belgrade officials to testify at the Tribunal.

17. (C) As in the case of Croatia, she will briefly note some positive behavior including "some improvement in attitude" and a better public posture following the Djindic assassination. She will also favorably note the appointment of a special war crimes prosecutor and the passage of a new law on war crimes. Del Ponte will also praise reforms in the army in an effort to give Defense Minister Tadic a boost. Conversely, she will single out Interior Minister Mihajlovic for criticism saying he lacks the willingness to take cooperation with the Tribunal to a new level following the initial promise of the post-Djindic assassination period.

18. (C) Del Ponte's brief discussion of BiH cooperation will note no change in the negative approach of the RS. While praising Bosnian cooperation generally, she will note that there is very little cooperation in cases involving Bosnian Croat perpetrators.

19. (C) The third and final section of Del Ponte's speech will focus on Domestic Courts and their ability to handle war crimes cases transferred from the ICTY. She will underscore the importance of establishing such a capacity quickly and flag two areas that warrant attention. First, she will describe the problem of ensuring the admissibility of cases and evidence transferred from the ICTY. Unless domestic law makes provision to receive cases from the Tribunal and accept as admissible evidence taken pursuant to ICTY procedures, Del Ponte fears that transferred war crimes cases could end up being shelved in domestic courts. Second, Del Ponte will emphasize the need for bilateral law enforcement cooperation among the states in the region and encourage the enactment of appropriate legislation and the conclusion of legal assistance treaties. Such cooperation is needed, she will report, to ensure the protection of witnesses and evidence in domestic cases. Similarly, extradition treaties between states in the region could facilitate the trial of suspects in the country where the evidence and witnesses are located and which has the best ability to protect them. Del Ponte will urge the international community to assist in strengthening and establishing domestic courts to try war crimes cases and will push for a donors conference for the Bosnia State Court. She will also ask the international community to press local governments to improve their domestic laws and to intensify bilateral cooperation among themselves.

President's Report

10. (C) ICTY President Ted Meron is committed to the achievement of the completion strategy and his report is intended to alert the Security Council that the Prosecutor's

investigative plans will put the Tribunal significantly off track for meeting its 2008 target date for finishing all trials. Meron's report begins by describing the "great progress" the Tribunal has made in striving towards the completion strategy targets. He identifies various key factors that have been and will continue to be critical in reaching the completion targets including the frequency of guilty pleas, internal reforms to enhance efficiency, efforts to establish a war crimes chamber in the Bosnia state court that will be able to receive cases transferred from the ICTY, and improving cooperation with the ICTY by states in the region.

11. (C) In terms of accomplishments, Meron reports that the Tribunal has tried 44 perpetrators in 22 trials, resulting in five acquittals. The Tribunal is operating at an all time high pace with four to six trials being heard at a time. The chambers have adjudicated 29 cases on the merits, heard three cases involving contempt, and reached four final judgments. The appeals chamber has considered 36 interlocutory appeals, two reviews of the merits, two contempt cases, and one judgment on the merits. Meron comments favorably on the increasing trend towards plea bargaining at the Tribunal singling out the positive impact of the Plavsic plea and noting that a total of 15 guilty pleas have now been entered. He observes that a plea which includes a properly detailed acknowledgment of guilt and an expression of remorse can play a constructive role both in the region and in bringing other perpetrators to justice.

12. (C) Meron provides an overview of key reforms that have enhanced the ability of the Tribunal to meet its completion strategy targets. Security Council action in December 2002 and July 2003 has improved efficiency by eliminating the prohibition on ad litem judges handling pretrial proceedings and making clear the Council's desire that the tribunal try only those at the most senior levels who are most responsible for war crimes. Internally, amendments to the Tribunal rules have streamlined trials by limiting the amount of time that witnesses testify, curtailing the number of witnesses, and reducing the number of crime sites for which evidence needs to be introduced to establish the crime base. In the region, progress towards establishing a war crimes chamber in Bosnia at the earliest possible time will prove critical in the ability of the Tribunal to transfer cases to domestic authorities for adjudication. Meron notes the PIC endorsement of the war crimes chamber in June 2003 and plans for a donors conference later this month. The revitalization of a working group involving the three parts of the ICTY (Registry, OTP, and Chambers) has enhanced coordination, efficiency, and provided a good forum for identifying and implementing reforms that shorten trials and speed appeals. Meron also comments favorably on an OTP proposal for reforms and certain rule amendments which is currently under consideration in the Chambers, Rules Committee. These efforts include improving and making more efficient the process of information disclosure to defense counsel and the presentation of evidence.

13. (C) Looking ahead, Meron notes that a critical factor in assessing whether the completion strategy targets will be met is the prosecutor's intention with respect to future indictments. Meron underscores that additional variables such as the average length of proceedings and the timing of arrests (i.e. so multiple individuals under one indictment can be tried together rather than in separate trials), the number of guilty pleas, and how quickly the state war crimes chamber is established make it impossible to predict with scientific accuracy when the work of the Tribunal will be completed. That said, given his current projections, Meron believes it is possible to try 22 additional cases by the end of 2008 deadline. This would include the trial of all individuals currently in custody. If Karadzic, Mladic, and/or Gotovina are brought into custody soon, it should also be possible to try two of the three by 2008. Because the trial of all 17 at large indictees would necessitate 11 additional trials, however, it is not possible to complete all of them by the end of 2008 unless some of the underlying variables change (e.g. there is a surge in the number of guilty pleas).

14. (C) Remarking on the Prosecutor's plans, the President notes that 14 new indictments she contemplates will necessitate 8 to 9 new separate trials. Noting that he has a "duty to be candid," Meron concludes: "I must tell you that given our current projections, it will not be possible to accommodate any of these new indictments within the timeframe set by the Council." Meron further observes that it is not within the authority of the chambers to decide which of those indictments submitted for confirmation involve those perpetrators who are the "most senior leaders most responsible for crimes within the ICTY's jurisdiction." (quoting the UNSCR 1503 of August 2003). He adds that it is a matter for the Council and the Prosecutor, and that if the OTP proceeds with the indictments indicated that the completion date could slip by two years. Meron concludes by

observing that speed cannot come at the expense of fairness and that the work of the Tribunal could not, in any event, be considered done until Mladic and Karadzic are brought into custody.

15. (C) Comment. The reports of the President and Chief Prosecutor will put the Security Council and the international community on notice that the ICTY is not on track to meet the completion strategy deadlines, particularly if the Prosecutor proceeds with her plans to seek another 14 indictments. Del Ponte is hoping that the Council defers until 2005 any action in the face of this downbeat report until her investigations are complete. (Indeed, she objected to an earlier draft of Meron's speech that followed its review of the timetable with a request that the Security Council provide guidance to the ICTY on how it should meet the competing priorities.) If the Council acquiesces in this approach, however, it will be all but impossible for the ICTY to meet its completion targets. Even if a new war crimes chamber in BiH is quickly established, Del Ponte's speech makes clear that none of the 30 new targets she has in mind are of the mid to lower level that would be appropriate for transfer to the Court. On the other hand, Security Council action now on this issue risks charges of prosecutorial interference and could send a mixed signal to the region (and suspects) about the policy imperative being the closure of the Tribunal rather than the pursuit of justice for war crimes victims.

16. (C) Comment continued. A middle ground might be to include in a statement issued by the Security Council President (supported by interventions of like-minded governments) an expression of serious concern about the projections in the reports, a call on the President to continue his reforms, and a pointed request to the Chief Prosecutor to reconsider her plans for 2004 with an eye towards limiting new indictments only to the most senior and critical echelon of war crimes suspects. Coupled with language that urged the strengthening and/or creation of a domestic capacity to receive and try war crimes cases in the region so that perpetrators would not escape justice, such a statement might encourage Del Ponte to take a more modest approach in the coming year with few downsides. End comment.
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